FILE COPY

Office Supreme Court
APR 15 19

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

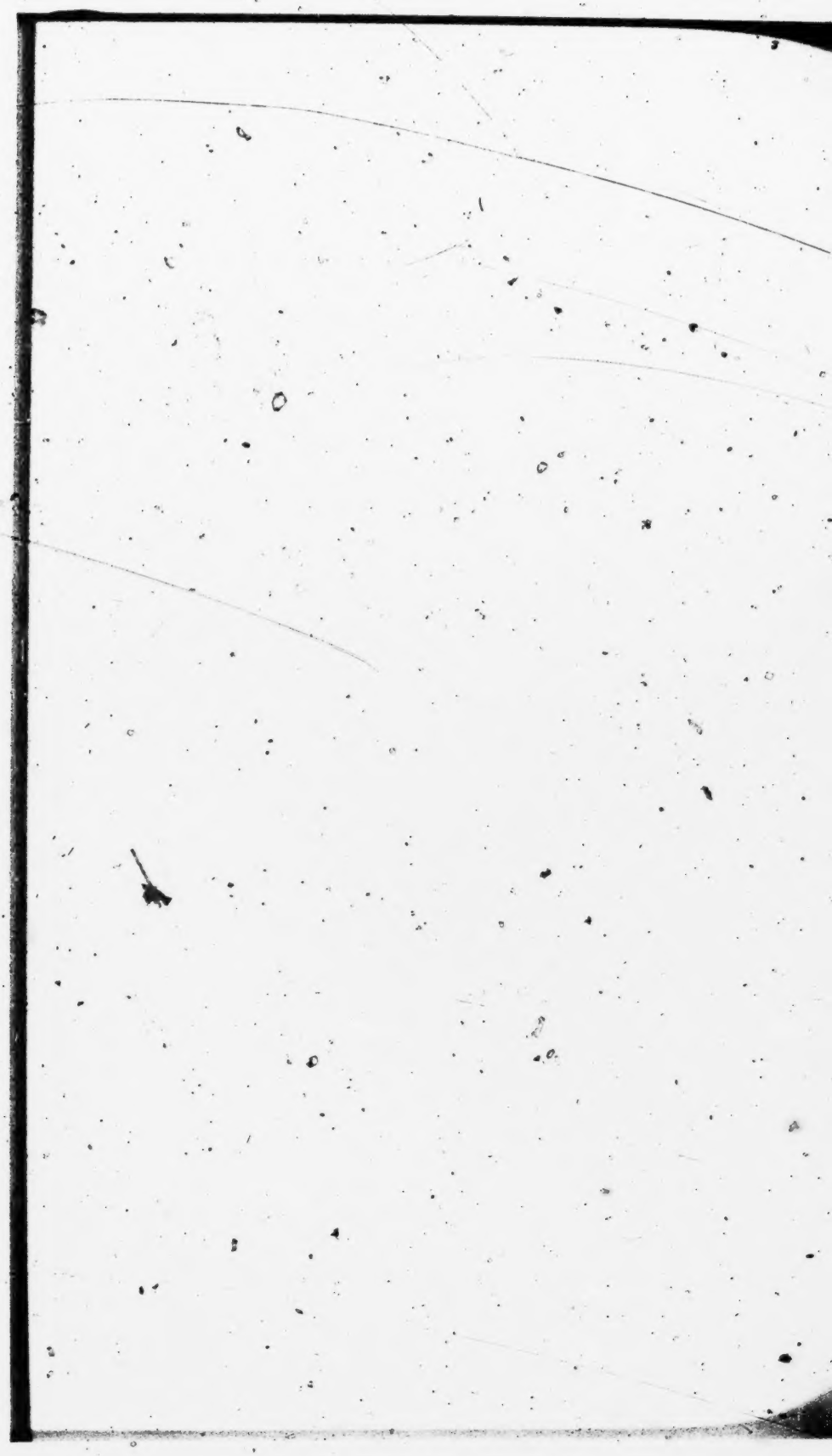
vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT UNION STOCK YARD & TRANSIT COMPANY ON THE MERITS.

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Counsel for Petitioners,
230 South Clark St.,
Chicago, Illinois.

SUNTHORP-WARREN PRINTING COMPANY, CHICAGO.



INDEX.

		PAGE
Statement		1
Summary of Argument		3
Argument:		
Point I	—The *prima facie* effect of the order of the Commission was not rebutted either by evidence submitted to the Commission or by evidence submitted to the court	7
Point II	—We admit the appeal is from the judgment of the lower courts and not from their opinions	8
Point III	—The vice of the practice condemned by the Commission was not the unreasonableness of the amount of the charges in and of themselves in the tariffs of the line-haul carriers and of the Yard Company, but the practice resorted to compelled the shipper to pay an extra charge for the loading and unloading service when that service was already covered by the charges in the published tariffs of the line-haul carriers	9
Point IV	—This court cannot consider and weigh the evidence before the Commission, as respondent seeks to persuade it to do	23
Point V	—The right of petitioners to maintain reparation proceedings before the Interstate Commerce Commission and to maintain the suit in the instant case in the District Court is established by the brief filed by the Interstate Commerce Commission as *amicus curiae* and by subdivisions VII A and B of petitioners' brief on the merits, pages 75 to 96	26

Point VI—This point is not properly before this court as it was not raised in the trial court or noticed either by the District Court or by the Circuit Court of Appeals. The contention made that the orders of reparation involved included charges growing out of intrastate shipments is not sustained by the facts in the case. Even if the award improperly included items growing out of purely intrastate shipments, this would only affect such particular items. The Commission had authority, under the Federal Control Act and by Section 206-A of the Transportation Act, to enter the orders in question..... 29

Point VII—This point was not raised in the trial court or noticed either in the District Court or in the Circuit Court of Appeals. Furthermore, there is no basis in fact for the contention.. 37

Point VIII—The contention that the Commission did not have before it any competent evidence upon which the amount of reparation could be determined is not in accordance with the facts and is refuted by the record of the Interstate Commerce Commission. There was competent evidence introduced, ample to support the award of reparation. The method adopted of proving the multitude of charges involved was in accordance with the recognized modern rule with reference to proof of voluminous accounts, books and records, and approved by this Court in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117..... 41

Point IX—The contention that the award of reparation here involved is void because the Commission in making it considered evidence not properly introduced in evidence before it, is not in accordance with the truth in that regard 49

Cases Cited.

Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U. S. 370 13
Armstrong v. Belding Bros., 296 Fed. 728, certiorari denied in 265 U. S. 585 46
B. & O. S. W. Co. v. Brubaker, 217 Ill. 462 45
Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426 35
Davis v. Keystone Steel & Wire Co., 317 Ill. 278 35
Grand Pass Shooting Club v. Crosby, 181 Ill. 266 45
Interstate Commerce Commission v. Baird, 194 U. S. 25 47
Interstate Commerce Commission v. C. B. & Q. R. R., 186 U. S. 320 15
Interstate Commerce Commission v. Stickney, 215 U. S. 98 .. 14
Lewis-Simas-Jones v. Southern Pacific Co., 283 U. S. 654 40
Meeker v. Lehigh Valley Ry. Co., 236 U. S. 412 8
Mellon v. World Publishing Co., 20 Fed. (2d) 613 33
Missouri, K. & T. R. R. Co. v. Elliott, 102 Fed. 96, affirmed in 184 U. S. 695 46
Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554 34
Morrill v. Jones, 106 U. S. 466 29
Nash v. Classen, 163 Ill. 409 45
People v. Small, 319 Ill. 437 46
Reinke v. Sanitary District of Chicago, 260 Ill. 380 47
Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531 ..26, 33
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U. S. 117 .....6, 47
Virtue v. Creamery Package Co., 227 U. S. 8, at pp. 38-39 ... 29
Walker v. Sauvinet, 92 U. S. 90 29
Wyman v. City of Chicago, 254 Ill. 202 45

STATUTES CITED.

Act to Regulate Commerce:
Sec. 1 (6) (U. S. C. A. Title 49, Sec. 1 to 15a, p. 79) 14
Sec. 6 (3) 18
Sec. 15 (U. S. C. A. Title 49, Sec. 1 to 15a, p. 426) 15
Sec. 16 31
Federal Control Act:
Sec. 10 14
Transportation Act:
Sec. 74 (c) 33
Sec. 206-A 4, 5
Wigmore on Evidence, Vol. 3, (2d Ed.) Sec. 1530 47

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581.

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,

Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,

Respondents.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT UNION STOCK YARD & TRANSIT COMPANY ON THE MERITS.

STATEMENT.

MAY IT PLEASE THE COURT:

The statement in the brief of respondent Union Stock Yard & Transit Company is substantially correct. There are, however, a number of statements therein contained which are not correct or are only partially correct and therefore misleading. Inasmuch as the same incorrect or misleading statements are made in the argument, in order to save repetition we will call the attention of the court to such incorrect or misleading statements in our reply to the various subdivisions of respondent's brief.

ARGUMENT.

PREFACE.

In some respects the points and contentions made by counsel for respondent Union Stock Yard & Transit Company coincide with the points and contentions made by respondent Director General. In other important respects the contentions of respondent Union Stock Yard & Transit Company are radically different.

It is to be observed:

1. That respondent Union Stock Yard & Transit Company makes no contention that the so-called classifications in the published tariffs of the line-haul carriers applied to shipments of stock consigned to Union Stock Yards, Ill., or that the so-called absorption clause in the published tariffs of the line-haul carriers constituted the limit and extent of the obligation of the line-haul carriers with reference to the unloading service.

2. That respondent Union Stock Yard & Transit Company makes no claim that in performing the loading and unloading service it was not acting as the agent for the line-haul carriers.

3. That respondent Union Stock Yard & Transit Company makes no claim that in stating that the charges contained in its published tariffs were "as a carrier's agent" it did not intend to restrict the application of such charges to the line-haul carriers.

4. That respondent Union Stock Yard & Transit Company denies that it collected from the shipper and retained the controversial 25 cents per car.

5. That respondent Union Stock Yard & Transit Company does not deny the correctness of the finding of the Commission that the stock yards were the terminals of the line-haul carriers.

SUMMARY OF ARGUMENT.

I.

While we admit the law to be that an order of the Commission to be sustained by the courts must be supported by evidence and must not be contrary to the law, and that the *prima facie* effect of an order of the Commission may be overcome either by the evidence submitted to the Commission or by evidence submitted to the court, we contend that the orders of the Commission involved in this case were not so rebutted.

II.

We admit that the appeal herein is from the judgment of the lower courts and not from their opinions.

III.

While the Yard Company as a common carrier was obligated to file with the Commission its tariffs containing its charges for the loading and unloading of live stock, it was not required or authorized to collect said charges or to join with the line-haul carriers in collecting the same from the shipper against whom the charges in said tariffs were not directed. The vice of the practice condemned by the Commission was not the unreasonableness of the amount of such charges, but that the practice resorted to by respondents in effect compelled the shipper to pay an extra charge for the loading and unloading service when that service and the charges therefor were legally covered by the published tariffs of the line-haul carriers then on file.

IV.

This court cannot consider and weigh the evidence before the Commission to ascertain whether the weight of the evidence supports the finding of the Commission that under the particular facts and circumstances in this case it was the duty of the line-haul carriers to load and unload live stock at Union Stock Yards, Ill. Under this subdivision respondent seeks to persuade the court so to do.

V.

The various phases of the question with reference to the right of petitioners to maintain the reparation proceedings before the Interstate Commerce Commission and to maintain the suit in the instant case in the District Court have already been covered by the able and exhaustive brief filed by the Interstate Commerce Commission as *amicus curiae* and by subdivisions VII A and B of petitioners' brief on the merits, pages 75 to 96.

VI.

The contention made that the orders of reparation involved in this case were invalid because they included charges growing out of intrastate shipments is not sustained either by the facts or by the law in the case. If the award of reparation had included items growing out of purely intrastate shipments, this would only affect such particular items. The burden of proof to show that there were such items included in the award was on respondent. By the Federal Control Act, a war measure, and by Section 206-A of the Transportation Act, the Commission was given full jurisdiction to grant reparation on account of un-

lawful or unreasonable charges exacted on purely intrastate shipments during the period of Federal Control. Nor is this point now properly before this court, inasmuch as it was not raised in the District Court or noticed either by the District Court or by the Circuit Court of Appeals.

VII.

The contention that the Commission was without jurisdiction to award reparation against the Yard Company in Docket No. 9977, and that therefore the order of the Commission of December 12, 1927, is void as against the Yard Company, is untenable and based on hypercritical and farfetched conclusions. There is no basis of fact in the record to sustain any such contention, nor was this point raised in the District Court or noticed in either the District Court or the Circuit Court of Appeals.

VIII.

The contention that the Commission did not have before it any competent evidence upon which it could determine the amount of reparation awarded by it is untenable and clearly refuted by the record of the Interstate Commerce Commission admitted in evidence in the District Court. This point is so devoid of merit that counsel for respondent Director General do not even mention it in their brief. The argument of counsel for respondent Yard Company on this phase of the case is based upon a misconstruction of the facts in the case. The evidence introduced was ample to support the award of reparation. If any erroneous item of charges was included in the proof made by petitioners in the proceedings before the Interstate Commerce Commission, it was incumbent upon respondents, who had in their possession complete records of all of the shipments

involved, to have pointed out such error to the Commission. The method adopted in this case of proving the multitude of charges involved was in accordance with the recognized modern rule with reference to proof of voluminous accounts, books and records. The method adopted was also in accordance with the method of proof adopted in the case of *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, and there approved by this court.

IX.

The contention that the award of reparation here involved is void because the Commission in making it considered evidence not properly introduced in evidence before it, is not in accordance with the truth in that regard. The basis of the contention is a misunderstanding or misinterpretation of what actually took place before the Commission.

ARGUMENT.

I.

WE ADMIT THE LAW TO BE THAT AN ORDER OF THE COMMISSION TO BE SUSTAINED BY THE COURTS MUST BE SUPPORTED BY EVIDENCE AND MUST NOT BE CONTRARY TO LAW; FURTHER, THAT THE PRIMA FACIE EFFECT OF AN ORDER OF THE COMMISSION MAY BE REBUTTED EITHER BY THE EVIDENCE SUBMITTED TO THE COMMISSION OR BY EVIDENCE SUBMITTED TO THE COURT.

We agree with counsel for the respondent Yard Company that the fact that the Commission has made an order in this case does not mean that the proceedings in the trial court should have differed in any way from the accepted methods of trying any other suit therein, or that the trial judge should have adopted a different attitude toward petitioners than toward other litigants. We admit further that it was open to respondents in the District Court to contest the propriety of the order by showing that there was no competent evidence before the Commission upon which to base the order, or by showing that the Commission exceeded its power in making it. We contend, however, that if there was competent evidence before the Commission upon which the order of the Commission might be justified, the court is without power to weigh the evidence introduced before the Commission for the purpose of arriving at a conclusion differing from that of the Commission.

We admit, subject to the rule that the orders of the Commission in the instant case must be considered by the court as prima facie correct, that petitioners were in the same position as any other plaintiffs seeking a recovery and subject to the same obligations. We admit further the rule as

laid down in *Meeker* v. *Lehigh Valley Railway Company*, 236 U. S. 412, to the effect that the provision of Section 16 of the Act to Regulate Commerce, making prima facie correct the orders of the Commission, establishes a rebuttable presumption and cuts off no defense and interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury.

Our contention is that there was ample competent evidence before the Commission upon which to base the order of reparation in this case, and that the prima facie effect of that order was not overcome by any evidence offered in the District Court.

II.

WE ADMIT THAT THE APPEAL HEREIN IS FROM THE JUDGMENT OF THE LOWER COURTS AND NOT FROM THEIR OPINIONS.

While we admit that this court has the right, in a proper case, to affirm the judgment of the lower court on grounds not mentioned in its opinion, we contend that the raising by counsel for respondents of other grounds not mentioned in the opinion is an indication of the lack of faith in the correctness of the grounds upon which the lower court based its judgment.

It is our contention that a judgment of the lower court is in legal contemplation and adjudication of the rights of the parties based upon the particular facts in the case; that it is the effect of the judgment of the lower court as applied to the particular facts in the case which is involved on appeal. We have discussed this proposition in subdivision X of reply to brief of Director-General p. 68.

III.

THE YARD COMPANY, IF A COMMON CARRIER, WAS OBLIGATED TO FILE WITH THE COMMISSION ITS TARIFFS CONTAINING ITS CHARGES FOR LOADING AND UNLOADING OF LIVE-STOCK, BUT IT WAS NOT REQUIRED OR AUTHORIZED TO COLLECT SAID CHARGES OR TO JOIN WITH THE LINE-HAUL CARRIERS IN COLLECTING SAID CHARGES FROM THE SHIPPER AGAINST WHOM THE CHARGES IN SAID TARIFFS WERE NOT DIRECTED. THE REASONABLENESS OF THOSE CHARGES, SO FAR AS THE AMOUNT THEREOF WAS CONCERNED, WAS NOT CONDEMNED BY THE COMMISSION BECAUSE THAT QUESTION WAS NOT INVOLVED.

Under this subdivision counsel for the respondent Yard Company remind the court that it consistently maintained in the proceedings before the Commission that it was not a common carrier. Manifestly, if this contention is correct, the including of the controversial 25 cents per car in the freight bills of the line-haul carriers was wholly without tariff authority, and therefore the Director General of Railroads must, in any and all events, be held liable, regardless of the liability of the Yard Company. Manifestly, also, if that position was correct, the Yard Company, in performing the loading and unloading service, necessarily acted as the agent for the line-haul carriers.

Under this subdivision counsel for the respondent Yard Company seek to shift the onus and responsibility for its part in the practice resorted to by respondents to exact from the shipper the charges in controversy by asserting:

> "The Commission in its Investigation and Suspension Docket 1118, declined to permit the Yard Company to discontinue the publication of its tariff containing its increased charges of 50 cents and 75 cents for unloading and loading live stock, and affirmatively required the Yard Company to continue the filing with it of that tariff."

This statement is extremely misleading. It infers that the Commission required the Yard Company to continue in force and effect its new tariffs of May 21, 1917. The record shows that the Yard Company never made any attempt to change or amend the charges in its published tariffs of May 21, 1917. The Yard Company, on September 1, 1917, made application to the Commission not only to withdraw its tariffs of May 21, 1917, *but to withdraw all of its published tariffs, inseparably coupled with a request to the Commission to approve its proposed plan of making the entire subject of loading and unloading a matter of private operating arrangement between the Stock Yard Company and the line-haul carriers* (R. 250-251). Simultaneously with the filing of said application the Yard Company notified each of the line-haul carriers that the attempt on the part of the Yard Company to cover the use of its facilities by tariff instead of placing the same on an operating basis was then and always had been a mistake (R. 251; Certified Excerpts from Original Exhibits, pp. 5, 6).

YARDS COMPANY WAS NOT REQUIRED BY COMMISSION TO KEEP IN EFFECT ITS INCREASED TARIFFS.

The statement made by counsel for the respondent Yard Company, on page 30 of their brief, to the effect that during the entire reparation period covered by the petition herein the Yard Company was obligated, under the Commission's decision, to collect its charges of 50 cents per car for unloading and 75 cents per car for loading live stock, is based on the misleading inference given concerning the action of the Commission. The record conclusively shows that the Yard Company could, at any time after the filing of its tariff of May 21, 1917, have withdrawn the same and substituted its former tariff charges of 25 cents per car for unloading and 50 cents per car for loading.

Clearly, in any event, the Yard Company was not obligated to collect the controversial 25 cents per car from the shipper, against whom its tariff as worded was not directed.

REASONABLENESS OF SEPARATE CHARGES NOT INVOLVED.

We have heretofore in our reply to the brief of respondent Director General shown that the issue of the reasonableness in amount of the charges of the Yard Company and of the charges of the line-haul carriers was not involved; that the holding of the Commission that the practice resorted to by respondents to exact from the shipper the controversial 25 cents per car was unlawful and unreasonable because of the grounds assigned in the order of the Commission (R. 144-145), it was wholly unnecessary for the Commission to consider the question of whether the charges of respondents, considered in and by themselves, were unreasonable or excessive in amount. However, while not vital or controlling in this case, the Commission did specifically find that the separate 25 cents per car was an unlawful charge (R. 151). The reason, however, for so holding was not from the standpoint of the amount of the combined charges of respondents, but because, under the published tariffs of the line-haul carriers then on file, the shipper was legally entitled to a full and complete transportation of his live stock to Union Stock Yards, Ill., including the unloading, and therefore the extra 25 cents per car set up in the separate published tariffs of the agent or instrumentality through which the line-haul carriers performed the unloading service was an unlawful charge.

The statement of counsel for respondent, on page 31 of their brief, that the first complaint of the Chicago Live Stock Exchange asked that the line-haul carriers be required to absorb the increased charges of the Yard Company, and that said complaint alleged that with the 25 cent

increase in the Yard Company's charges added to the line-haul rates, those rates were unreasonable.

If true, this would not change the situation, because that complaint also charged that the practice resorted to by the line-haul carriers and the Yard Company to collect the controversial 25 cents per car from the shippers was an unlawful and unreasonable practice. But the statement of counsel for respondent is not true. Both the complaint in No. 9977 and the complaint in No. 12614 clearly stated that the handling of the 25 cent increase in the Yard Company's charges was a matter wholly between respondents, in which complainants had no interest (R. 254). Furthermore, in neither the prayer of the complaint in No. 9977 (R. 256) nor in the prayer of the complaint in No. 12614 (R. 266) do the complainants ask that the line-haul carriers be required to absorb the increased charges of the Yard Company. But if they had, it could make no difference. When the evidence before the Commission clearly showed that such practice was unlawful under the facts and circumstances in the case, the Commission had the right to so declare and to award reparation regardless of any and all other allegations and requests contained in the complaints.

It is argued that because the Commission in its order did not find that the charges of the Yard Company and the charges of the line-haul carriers were unreasonable from the standpoint of the amount thereof, this court must consider that those rates and charges were reasonable. On this premise it is argued with apparent sophistry that the order of the Commission awarding reparation to petitioners in effect required the Director General to reduce his line-haul rates by the amount of the increase in the charges of the Yard Company, or required the Yard Company to refund one-half of the unloading charges collected by it and one-third of the unloading charges collected by it during the reparation period. If this contention is allowed to

prevail, it necessarily follows that no award for reparation in any case can be lawfully awarded by the Commission on either the ground that the charges are unlawful or that the practice resorted to to collect the same was unlawful, without there also being an investigation and finding of the reasonableness of the charge exacted from the standpoint of its amount. Thus a carrier having a charge of $15.00 per car for the transportation of live stock to a certain destination could exact $20.00 per car from the shipper, and unless the shipper showed that $20.00 per car was an unreasonable charge from the standpoint of the amount thereof, an order of the Commission granting reparation would be invalid and void.

YARDS COMPANY NOT LEGALLY REQUIRED TO COLLECT EXTRA CHARGE FROM SHIPPER.

In this connection counsel for respondent, on page 33, say:

> "If the Yard Company was a common carrier, the law required it to collect and retain the entire amount of its loading and unloading charges."

This statement obscures the fact that the tariffs of the Yard Company furnished no justification for the collection of any charges whatever against the shipper, as the present counsel for the Yard Company strenuously and repeatedly asserted before the Commission (Certified Excerpts from Original Exhibits, pp. 56-57-58). It also obscures the proposition that although the law makes the rates contained in the published tariffs of a carrier the legal rates which it in the first instance is bound to collect, nevertheless the law provides a right of reparation to the shipper for unlawful charges exacted from him, irrespective of the fact that in the first instance the line-haul carrier is compelled to collect the full amount of its published charges. (*Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370.)

On page 35 of their brief counsel for respondent Yard Company concede the right of the Commission to condemn an unreasonable practice under Section 1 (6) of the Act to Regulate Commerce, (U. S. C. A. Title 49, Sec. 1 to 15a, p. 79) and Section 10 of the Federal Control Act, but say that in this case "the Commission sought to cloak its action by a finding that the practice of collecting the charges was illegal." This charge is unwarranted. The question here involved was not whether the charges of the Yard Company in and of themselves were unreasonable, or whether the charges in the published tariffs of the line-haul carriers in and of themselves were unreasonable, but whether, in view of the fact that the charges of the Yard Company in its published tariffs purported to be agents' charges against the line-haul carriers and the charges in the published tariffs of the line-haul carriers purported to cover the entire charges against the shipper for the transportation of his live stock, including unloading, the line-haul carriers and the Yard Company could lawfully unite in a practice whereby the shipper was forced to pay the extra 25 cents per car occasioned by the increase in the charges of the Yard Company in its tariffs filed May 21, 1917, for a service already legally included in the through charges of the line-haul carriers in their tariffs then on file.

In this subdivision counsel for respondent the Yard Company say that the situation in the instant case is precisely the same as in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98. In our reply to the brief of respondent Director General, at pp. 49-50, we discuss the situation and legal points involved in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, and show that the situation in that case and the questions there involved are entirely different than the question here presented. It is unnecessary to repeat what we there said.

Counsel for respondent the Yard Company also say that the decision in *Interstate Commerce Commission* v. *C. B. & Q. R. R. Co.*, 186 U. S. 320, is in point. We submit, however, that there is no similarity between the situation here involved and that involved in *Interstate Commerce Commission* v. *C. B. & Q. R. R. Co.* In that case the Commission specifically found that the $2.00 per car terminal charge there in question was in itself reasonable. It also found that the through rate, when separately considered, was just and reasonable. In that case the only charges involved were in the separate published tariffs of the line-haul carriers delivering live stock to Union Stock Yards, Ill. The through line-haul rate and the $2.00 terminal charge therein contained were charges of a single carrier contained in its separate published tariffs. They were not, as in this case, charges of two common carriers, each attempting in its published tariffs to deal with and cover by charges the identical service.

It is urged that what the Commission was trying to do in this case was to require the absorption of the charges of the Yard Company by the line-haul carriers. The orders of the Commission disclose no intent on the part of the Commission to require the line-haul carriers to absorb the charges of the Yard Company. It declares the practice resorted to by respondents to exact from the shipper the controversial 25 cents per car unlawful, and holds them jointly and severally liable to make reparation.

We have already in our reply to the brief of respondent Director General answered the suggestion made by counsel for respondent Yard Company, that the inclusion of Sec. 15 of the Act to Regulate Commerce (U. S. C. A. Title 49, Sec. 1 to 15-A, p. 426) in the Transportation Act of February 29, 1920, indicates that before the enactment of such Act it was not the duty of the line-haul carriers to load and unload live stock at Union Stock Yards, Ill.

(1) THE CHARACTER OF THE CHARGE COLLECTED.

Counsel for respondent facetiously say that there was nothing unlawful or illegal in the increased charges of the Yard Company unless the assertion of counsel makes them so. The increased charges of the Yard Company may or may not have been in and of themselves, *as applied to the line-haul carriers against whom such charges in the published tariffs of the Yard Company were directed,* reasonable, lawful or legal, but the extra charge of 25 cents per car exacted from petitioners without authority of either the published tariffs of the line-haul carriers or the Yard Company was an unlawful charge. This portion of the argument for respondent attempts to center attention on *reasonableness of the charges* of the Yard Company to the exclusion of the fact that the tariffs of the Yard Company did not authorize the collection of said charges from petitioners, and that the charges of the Yard Company were for a service already covered by the published tariffs of the line-haul carriers then on file.

STATEMENT OF FUNDAMENTAL QUESTION INVOLVED.

Opposing counsel say that in the absence of a finding by the Commission that the charges contained in the tariffs of the Yard Company were unreasonable and unlawful, they must be presumed to be reasonable and lawful. Be that as it may, it has no bearing on the question here involved. Try as hard as they may to obscure the real question of substance involved, the question before the Commission WAS: WHERE A LINE-HAUL CARRIER IN ITS PUBLISHED TARIFFS HOLDS ITSELF OUT TO THE PUBLIC TO TRANSPORT LIVE STOCK TO THE UNION STOCK YARDS, ILL., FOR A THROUGH RATE OR CHARGE, WHICH INCLUDES THE UNLOADING OF SUCH LIVE STOCK, IS THE SETTING UP OF A SEPARATE CHARGE FOR THE UNLOADING SERVICE IN THE PUBLISHED TARIFFS OF AN AGENCY OR

INSTRUMENTALITY WHICH PERFORMS THE UNLOADING SERVICE FOR THE LINE-HAUL CARRIER AND THE EXACTION FROM THE SHIPPER OF BOTH THE THROUGH RATE OR CHARGE OF THE LINE-HAUL CARRIER AND THE SEPARATE ADDITIONAL CHARGE IN THE PUBLISHED TARIFFS OF SUCH AGENT OR INSTRUMENTALITY, AN UNLAWFUL PRACTICE?

(2) THE ALLEGED WRONG COMPLAINED OF BY PETITIONERS.

Under this heading it is said that the position taken by petitioners, that the wrong committed by the Yard Company was in conniving with the Director General to collect the charges sued for herein from the shipper when it had knowledge of the shipper's right to a completed transportation service, including unloading, without such payment, is based upon a misunderstanding. Opposing counsel attempt to make it appear that the misunderstanding referred to is the result of the failure of counsel for petitioners to understand that because the line-haul carriers at one time absorbed all of the loading and unloading charges of the Yard Company they assumed a continuing obligation to absorb them at all times, regardless of their amount. There is no misunderstanding on our part as to the provisions of the absorption clause referred to. We have fully presented our views with reference to the force and effect of said absorption clause, on the questions here involved, in petitioners' brief on the merits at pages 44 to 50 and at pages 54 to 59, and also in our reply to the brief of respondent Director General, pages 63 to 66. It is unnecessary to repeat here what we there said.

The attempt to focus the attention of the court on the provisions of the absorption clause is to obscure the vital proposition that the charges in the published tariffs of the Yard Company were restricted to charges made by the Yard Company against the line-haul carriers for its services as their agent in performing the

loading and unloading service, and obscures the admitted fact that before the filing of the increased tariffs by the Yard Company on May 21, 1917, the through line-haul rates to Union Stock Yards, Ill., plus the $2.00 per car terminal charge, covered all of the expense to the shipper connected with the transportation of his live stock to that terminal station, including the unloading thereof, and that no change could lawfully be made in that situation without the line-haul carriers first changing that situation in the manner required by paragraph 3 of Section 6 of the Act to Regulate Commerce.

(3). THE ALLEGED AGENCY OF THE YARD COMPANY.

Under this heading counsel for respondent Yard Company say that we concede that the charges of the Yard Company were legally established. This is apt to be misleading. We concede, of course, the right and obligation of the Yard Company to file tariffs of its rates and charges, and admit that the legal measure of the charges to be collected is in the first instance the amount of such published charges, but we strenuously deny that there was anything in the published tariffs of the Yard Company which made the rates and charges therein contained a legal and lawful charge against the shippers. In this respect our contention is exactly the same as the contention made by the present counsel for respondent Yard Company before the Commission (Certified Excerpts from Original Exhibits, pp. 54-55-56-57-58).

Respondent Silent as to Position Taken Before Commission.

Opposing counsel are strangely silent with reference to the positive and unqualified position taken by them before the Commission as to the clear meaning and intent of the

published tariffs of the Yard Company. In this connection counsel for respondent (p. 42) admit that "the Yard Company did contend before the Commission that in performing the loading and unloading service it was acting as the agent of the line-haul carriers," but that this position was taken in an effort to support its claim then being made that it was not a common carrier. It is obvious that regardless of the particular point in support of which the contention was made, counsel for respondent Yard Company represented that it was an established fact that in performing the loading and unloading service the Yard Company was acting as agent for the line-haul carriers and that the charges in its published tariffs were intended as charges against the line-haul carriers and not against the shippers. If that representation of fact was true then, it is true now. *If it was the truth and fact for one purpose it was the truth and fact for all purposes.* The evidence overwhelmingly shows that the Yard Company in performing the loading and unloading service at all times acted as the agent of the line-haul carriers. In fact, there was no evidence before the Commission to the contrary.

The contention is made that all of the charges contained in both the published tariffs of the Yard Company and of the line-haul carriers were direct charges against the shipment and therefore charges which respondents were compelled to collect. This contention obscures the relationship, in the performance of the loading and unloading service, between the line-haul carriers and the Yard Company, the fact that the charges in the published tariffs of the Yard Company were directed against the line-haul carriers and not against the shipment or the shipper, and the proposition that the line-haul carriers and the Yard Company did not occupy the position of separate and distinct connecting carriers, each performing a separate and distinct portion of the transportation service.

(4) THE ALLEGED DETERMINATION BY THE CIRCUIT COURT OF APPEALS OF THE REASONABLENESS OF THE YARD COMPANY CHARGES.

Counsel for respondent deny that the Circuit Court of Appeals passed on the reasonableness of the Yard Company charges. The opinion of the Circuit Court itself is the criterion on which to determine the question of whether it did or did not attempt to justify the increased charges in the published tariffs of the Yard Company from the standpoint of the justice and reasonableness of such charges. (R. 397-398.)

(5) THE ABSORPTION OF THE YARD COMPANY CHARGES BY THE DIRECTOR GENERAL.

Under this caption counsel for respondent attempt to obscure the plain meaning of the portion of petitioners' brief on the merits (p. 25), where we urge that the question as to whether the line-haul carriers should have absorbed the increased charges of the Yard Company was not involved, by contrasting that position with the argument advanced in petitioners' brief on the merits, (pp. 30 to 51), wherein it is urged that the obligation to pay for the loading and unloading of live stock at the Chicago Stock Yards rested upon the line-haul carriers operating under Federal Control. There is inconsistency in the two contentions. The proceedings in the instant case before the Commission were between the consignees in the various shipments involved, on the one hand, and the line-haul carriers operating under Federal Control and the Yard Company, on the other, and involved the ultimate question as to whether or not the practice by which the extra 25 cents per car was exacted from the shipper was, under the particular facts and circumstances in this case, lawful. The determination of the question as to the duty to load and unload live stock at Union Stock Yards, Ill., was only necessary to show that

such was not the duty of the shipper *under the particular facts and circumstances shown by the evidence in this case.* When the Commission determined that the result of that practice was unlawful, it was unnecessary for the Commission to go further and determine what the line-haul carriers operating under Federal Control should have done in order to protect themselves against a suit for reparation.

What the Line-Haul Carriers Should Have Done.

Obviously, what they should have done before joining in the practice to exact the extra 25 cents from the shipper was to have filed a complaint with the Commission objecting to the reasonableness of the increased charges of the Yard Company or objecting to the restriction of the charges contained in the tariffs of the Yard Company making said charges applicable against the line-haul carriers for services performed by it as their agent. In such proceeding the line-haul carriers and the Yard Company could have threshed out the question as to whether the Yard Company, in performing the loading and unloading service, was acting as the agent of the line-haul carriers or as agent for the shipper, and whether or not the Yard Company could file its tariffs in such manner as to restrict the application of such charges to the line-haul carriers. It is not the fault of petitioners that the Yard Company and the line-haul carriers, operating under Federal Control, settled the controversy between themselves regarding the extra 25 cents per car by uniting in a practice whereby the extra charge was exacted from the shipper without lawful tariff authority.

Respondent Confuses Legal Rates with Lawful Charges.

Counsel for the Yard Company seek to distort the admission made by us (pp. 71 and 72 of Petitioners' Brief on the Merits), that as a matter of law the rates and charges

in the published tariffs of a common carrier are the legal rates which the carrier in the first instance (subject to the obligation to make reparation if such charges are afterwards found to be unlawful or unreasonable) is compelled to collect, into an admission that the Yard Company in this case was compelled to collect its tariff charges from the shipper. Our admission that in the first instance a common carrier is compelled to collect the full amount of its published charges was inseparably connected with the statement that such common carrier *is also compelled by law to observe the provisions of its published tariffs with reference to whom the same should be collected from.*

In this connection, opposing counsel say that petitioners claim that the Yard Company should have collected its charges from the Director General. We made no such contention. Petitioners are not interested in that question. The question in which petitioners are interested is whether under the particular facts and circumstances in this case it was lawful to exact the extra 25 cents from petitioners. Whether the Yard Company should have collected its charges from the Director General is a moot question so far as the issues in this case are concerned.

Frankly, we admit that we cannot conceive what opposing counsel mean by their statement (p. 45 of their brief):

> "Conceding that the Commission did not find any of these charges unreasonable, they (referring to us) cite *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 52 Sup. Ct. Rep. 183, to prove that in the absence of such a finding, the charges had to be paid, and having been paid could not be recovered."

There is certainly nothing in petitioners' brief which warrants this absurd statement. The unfairness and sophistry employed to place an obviously wrong construction on the meaning of arguments advanced by us would seem to indicate the need of desperate efforts to obscure the real questions of substance involved.

In concluding this subdivision opposing counsel quote and distort the language of petitioners' brief by this remarkable sentence:

> "It results, *to use the words of petitioners' brief*, that the charges 'are proper and will be sustained.'" (Italics ours.)

IV.

UNDER THIS SUBDIVISION RESPONDENT YARD COMPANY SEEKS TO PERSUADE THE COURT TO CONSIDER AND WEIGH THE EVIDENCE BEFORE THE COMMISSION TO ASCERTAIN WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTS THE FINDING OF THE COMMISSION THAT UNDER THE PARTICULAR FACTS AND CIRCUMSTANCES IN THIS CASE IT WAS THE DUTY OF THE LINE-HAUL CARRIERS TO LOAD AND UNLOAD LIVE STOCK AT UNION STOCK YARDS, ILL.

Under this subdivision counsel for respondent frankly confess the inconsistency of the position which they took before the Commission in this case and the position they now take in this court.

Here again counsel for respondent attempt to confuse the action of the Commission in requiring respondents to make reparation jointly and severally on account of the exaction from the shipper of the extra 25 cents per car by the practice resorted to by respondents in this case, with the different question of the right of the Commission to require the Yard Company to reduce its charges for the service rendered. The argument, though ingenious, is not persuasive. In a sense every order of reparation reduces the charges made but this does not mean that the Commission in order to award reparation as to over-lapping charges must also investigate the reasonableness of such charges.

Counsel for respondent Yard Company also seek to make it appear that the Transportation Act, which became

effective February 29, 1920, throws some light on the questions here involved. The same argument is advanced by counsel for respondent Director General. We have heretofore, on pages 30-31 of our reply to the brief of respondent Director General, shown the weakness of this argument.

It is also argued by counsel for respondent Yard Company that the question of the duty to load and unload in this particular case was one of law only. We have heretofore, at page 25 of our reply to the brief of respondent Director General, answered this argument by showing that the determination of this question is inseparably connected with the determination of the purely questions of fact to which we specifically call the attention of this Honorable Court.

It is next irrelevantly contended by counsel for respondent Yard Company that "petitioners were at all times able to secure a free delivery of live stock consigned to them at the yards operated by each of the line-haul carriers and could thus have avoided the payment of the loading and unloading charges of the Yard Company." It would be equally persuasive to argue that a passenger on the New York Central Railroad, who had paid an overcharge for transportation from Chicago to New York, should be denied the right to reparation because he might have avoided the payment of the overcharge by riding on the Pennsylvania. The line-haul carriers in their published tariffs specifically named Union Stock Yards, Ill., as a station to which their line-haul rates, plus $2.00 terminal charge, applied. Under such circumstances it seems absurd to argue that petitioners should be denied reparation in this case because the live stock covered by the shipments in question might have been consigned to yards operated by the line-haul carriers. Furthermore, the evidence before the Commission, introduced after the case had been reopened on rehearing after the first report had been filed,

conclusively shows that the yard facilities of the line-haul carriers in Chicago were entirely inadequate to take care of ordinary shipments of live stock to Chicago. Counsel for respondent, to inject confusion into this question, on page 51 quote from the reversed and discarded first report of the opinion (R. 134).

On page 52 of their brief counsel for respondent Yard Company say that reimbursement to the line-haul carriers for the original 25 cents and 50 cents per car for the unloading service was contained in the $2.00 terminal charge in the published tariffs of the line-haul carriers, and say:

> "The terminal charge would have been larger, however, had the loading and unloading charges of the Yard Company exceeded 25 cents and 50 cents per car. In 1917, when those charges were increased to 50 cents and 75 cents a car, the payment of the increase by the line-haul carriers would have been equivalent to a reduction in their rates."

This observation entirely loses sight of the uncontradicted fact that reimbursement to the line-haul carriers was included, in part, in the $2.00 terminal charge and in the flat through Chicago rate, and that the line-haul rates of the carriers had been, on account of the increased cost of transportation, increased by flat increases of 5 per cent, 15 per cent and 25 per cent, respectively. Obviously, such flat increases, aggregating more than 40 per cent, correspondingly increased the item for the loading and unloading service contained in the established line-haul rates of the cariers as they existed before such increase (Original Exhibit 7, pp. 861-890-891).

Counsel for respondent the Yard Company are also strangely silent with reference to the portion of petitioners' brief on the merits (p. 75), wherein we point out the flat increases in the line-haul rates of the carriers above referred to.

V.

THE QUESTION AS TO THE RIGHT OF PETITIONERS TO MAINTAIN THE REPARATION PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION AND TO MAINTAIN THE SUIT IN THE INSTANT CASE IN THE DISTRICT COURT HAS ALREADY BEEN COVERED BY THE ABLE AND EXHAUSTIVE BRIEF FILED BY THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE AND BY SUBDIVISIONS VII A AND B OF PETITIONERS' BRIEF ON THE MERITS, PAGES 75 TO 96.

We will not repeat what we have heretofore said on this subject at pages 75 to 96 of petitioners' brief on the merits. There are, however, a number of inaccuracies in the statements and deductions of counsel for respondent to which we desire to call attention.

On page 54 of the brief of the respondent Yard Company it is said that it is not contended by petitioners that this suit was not brought by them in their own names and right. This conclusion is not correct. Our contention is that while, as a matter of law, based on the particular facts in this case, petitioners had the right as parties to the transportation transaction from whom the controversial charges were exacted to maintain this suit in their own name under the principles of law laid down in the *Darnell-Taenzer* case, 245 U. S. 531, they were also entitled to maintain this suit as factors or as trustees of an express trust without disclosing the actuality that in instituting said suit they were acting for the use and benefit of the shippers whom they severally represented in the various shipments involved. The petition filed in this case (R. 4 to 18) specifically refers to and makes a part thereof by reference the various orders of the Commission on the basis of which reparation is sought. As we have heretofore observed, such orders and reports of the Commission

must be considered and read together as a whole and so construed. When so construed, it clearly appears, by fair intendment, that plaintiffs were seeking to recover against respondents in the same capacity in which they were awarded reparation by the Commission, viz., as factors or representatives of the owners of live stock whom they severally represented in the various shipments out of which the disputed charges in this case arose. No case has been cited by counsel for either respondent which requires a factor or trustee of an express trust to disclose in his declaration or petition the fact that he is a factor in the transaction or that he is the trustee of an express trust and is in fact bringing the suit for the use and benefit of another. Regardless of what the District Court or the Circuit Court of Appeals may have said on this subject, we maintain that the record in this case shows beyond question that the reparation proceedings before the Commission, and the suit in the District Court, were in truth and in fact brought and maintained by petitioners in this case for the use and benefit of the respective owners of live stock whom they represented in the various shipments out of which the disputed charges in this case arose. The theory on which petitioners or their counsel claimed the right of petitioners to maintain said proceedings before the Commission and in the District Court cannot change the law on the subject. The question of the right of petitioners to maintain this suit must be determined on the basis of the facts appearing in the record in this cause and the law applicable to such facts.

The prayer of the complaint in Docket No. 12614, brought in behalf of petitioners as members of the Chicago Live Stock Exchange, specifically prays (R. 266):

> "that said defendants be required to pay to the individual firms or corporations members of the Chicago Live Stock Exchange as factors and agents for the

use and benefit of the individuals, firms and corporations shown in Appendix A, or directly to said parties shown in Appendix A, by way of reparation for unlawful and unreasonable charges hereinbefore alleged."

By the testimony of dozens of witnesses before the Commission it was established that petitioners in this case were seeking reparation for and on behalf of the shippers whom they respectively represented in the various shipments involved in this case.

The Commission on this subject made the following specific finding of fact (R. 151):

> "There is a direct and well-established relation between the complaining members of the exchange and their shippers by which the former are fully authorized to present these claims and seek awards of reparation in their own names as factors and agents for such shippers. The commission merchant at the stock yards not only disposes of the shipper's stock at the market and at such price as he deems best, but is his agent in the payment of freight and related charges, such as feeding, etc., and in the filing of claims for overcharge and for loss and damage to the stock in transit."

The District Court should have accepted this finding.

The cases cited by counsel for the respondent Yard Company on page 58 of their brief, are all cases in equity. This is an action in tort, arising out of the exaction of unlawful charges through an unreasonable and unlawful practice. The rule applied in equity cases, that a suit must be brought in the name of the real party in interest, except in cases involving a trustee of an express trust, has never been applied by this court in a tort action involving the exaction of unlawful or unreasonable rates and charges.

On page 84 of brief for respondent Yard Company it is said:

> "Petitioners deny any obligation to turn any recovery over to their alleged principals."

This statement is wholly untrue. Throughout the entire proceedings before the Commission and in the courts petitioners have consistently and strenuously insisted that the shippers whom they severally represented in the various shipments out of which the charges in dispute arose will receive the full benefit of any recovery which may be had in this case.

VI.

THE CONTENTION MADE THAT THE ORDER OF REPARATION INVOLVED IN THIS CASE WAS WHOLLY INVALID BECAUSE IT INCLUDED CHARGES GROWING OUT OF INTRASTATE SHIPMENTS IS NOT SUSTAINED EITHER BY THE FACTS OR BY THE LAW IN THE CASE.

This is a new point which was not presented or in any manner brought to the attention of the Commission and which was not presented or brought to the attention of the District Court. In the motion filed in the District Court by respondent Yard Company, to instruct the jury to find the issues in favor of said respondent (R. 52 to 54), the various grounds upon which said motion was predicated were specifically set forth. The ground now urged in this court, that the order of reparation included charges growing out of intrastate shipments, is not one of said points, nor does the answer filed by respondent Yard Company (R. 21 to 29) contain any allegation or predicate any defense on any such ground. The rule is well established that a court of review will not notice a point which was not raised in the court below. (*Virtue* v. *Creamery Package Co.*, 227 U. S. 8, at pp. 38-39; *Morrill* v. *Jones*, 106 U. S. 466; *Walker* v. *Sauvinet*, 92 U. S. 90.)

It is sought to invalidate the order of reparation as a whole by an argument that the award may have included charges collected on purely intrastate shipments. This

argument, if it were not too late to raise it now, is untenable:

1. Because, if true, it could only affect the particular charges growing out of purely intrastate shipments, and could furnish no basis for the action of the District Court in entirely absolving both respondents from all liability.

2. Because, under the facts and the law in this case, the Commission had the right to hold respondents jointly and severally liable to make reparation on account of all items included in the award of reparation.

1. EVEN IF THE COMMISSION IMPROPERLY INCLUDED IN ITS AWARD OF REPARATION ITEMS OF CHARGES GROWING OUT OF PURELY INTRASTATE SHIPMENTS, THE AWARD WOULD ONLY BE AFFECTED TO THE EXTENT OF SUCH PARTICULAR CHARGES.

Even if we were to assume that the Interstate Commerce Commission had no jurisdiction to grant reparation against the Yard Company for charges growing out of purely intrastate shipments, would the mere fact that the award contained particular items of reparation based on shipments arising out of purely intrastate traffic during Federal Control invalidate the entire order? Manifestly not. The award of the Commission is by law made *prima facie* proof of the validity of the order and the validity of the proceedings of the Interstate Commerce Commission leading up to it. If the position of counsel for the Yard Company is correct, an award covering 600,000 or more separate items may be entirely invalidated by showing that one or two of the total items were based on shipments which were purely intrastate in character. Take, for example, in this case, Exhibit 1-A, consisting of many thousands of pages which is brought before this court as an original exhibit in a large box, giving detailed information as to each and every shipment involved in this case and showing that in many of the shipments the total repara-

tion sought is 25 cents. Suppose ten of these 25 cent items were on account of purely intrastate shipments. Ten of such shipments would involve a total of $2.50. Is it possible that any court would be impressed with the argument that the award as a whole amounting to approximately $140,000.00, is to be declared null and void and of no effect merely because of the erroneous inclusion of ten shipments involving reparations to the extent of $2.50? Would it not be more in accordance with judicial decisions, with justice and common sense to hold the order invalid only to the extent of the unauthorized items? If this were not true, the statute which makes the award *prima facie* correct would loose much of its intended force and effect.

We maintain that by force of Section 16 of the Act to Regulate Commerce, the award of the Commission make each and every item of the award prima facie correct; that in law each item is separate and distinct from the others so that the invalidity of one item will not affect the prima facie effect of the order as to other items.

The line-haul carriers and the Yard Company necessarily had records on the basis of which it could be shown whether any of the shipments included in Exhibit 1-A were purely intrastate shipments. The information given in Exhibit 1-A contained detailed information in regard to each and every shipment involved, including the car number, waybill, date of delivery, originating station, name of consignor, name of consignee, and the particular railroad company over whose lines the shipment passed (R. 283). Exhibit 1-A was filed with the Commission as an exhibit to the complaint in Docket I. C. C. No. 12614 and is referred to therein. It was afterwards formally introduced in evidence at the hearings before the Commission, and each and every one of the plaintiffs in this case, or some one in his or its behalf, testified with reference to the correctness of the shipments therein contained which were

handled, respectively, by the plaintiffs as consignees. If there were any items in that exhibit with reference to shipments where no reparation could legally be made, the Yard Company could easily have ascertained such fact from its own records and have pointed out such items to the Commission. Furthermore, the record shows that after the Commission had determined that the defendants should make reparation, the Commission by its order directed that statements in accordance with Rule V of the Rules of Practice of the Commission, be prepared and submitted to the appropriate defendants for verification; that if not so verified within a reasonable time such statements under Rule V should be filed with the Commission, for check upon the record, with a view to the entry of an order awarding reparation (R. 156). The record shows that the complainants prepared the Rule V statements required by the order of the Commission, and submitted them to the Director General of Railroads and to the Union Stock Yard & Transit Company, *who refused to verify the same.* (R. 211). Notwithstanding this as well as the fact that the Director General of Railroads and the Yard Company had tendered to them at one of the hearings before the Commission, for the purpose of checking and cross-examination, Exhibit 1-A above described, no such contention was made before the Commission nor was the point raised in the trial court. It is too late to raise the question here. *Neither of said respondents at any time ever made any complaint to the Commission that its order contained items growing out of purely intrastate shipments. Nor was any proof as to the existence of such items attempted to be shown by evidence in the District Court.* Respondent Yard Company *deliberately chose to allow the record to remain silent on that point in order that it might afterwards take advantage of the same.* The law does not reward such tactics.

2. BY THE FEDERAL CONTROL ACT, A WAR MEASURE, AND BY SECTION 206-A OF THE TRANSPORTATION ACT, THE COMMISSION WAS GIVEN FULL JURISDICTION TO GRANT REPARATION ON ACCOUNT OF UNLAWFUL OR UNREASONABLE CHARGES EXACTED ON PURELY INTRASTATE SHIPMENTS DURING THE PERIOD OF FEDERAL CONTROL.

The gist of the decision of this court in the *Darnell-Taenzer* case, 245 U. S. 531, is that all who participate in the collection of an unlawful rate or charge are jointly and severally liable to make reparation therefor. This construction of the Act to Regulate Commerce in effect became a part of the act the same as though it had been expressly written therein. When Congress in 1920 enacted paragraph (c), Section 74 of the Transportation Act, expressly conferring jurisdiction on the Commission to grant reparation on intrastate traffic during the period of Federal Control, is it logical to assume that Congress intended to bring about a result whereby the Interstate Commerce Commission would be given full jurisdiction to grant reparation as against one joint tort feasor and have no jurisdiction to grant reparation against another joint tort feasor in the same transaction?

A somewhat analogous question was involved in *Mellon* v. *World Publishing Co.*, 20 Fed. (2d) 613. There the question arose as to whether the Director General was liable to make reparation as to charges of carriers not taken over under Federal Control. The court, on page 617, says:

> "It is further said that some of the shipments passed part way en route over a line or lines not then under Federal Control, and as to these the Director General was not liable, at least to the extent of that part of the charges going to such line. *But in each instance the whole through charge was exacted by and paid to the delivering carrier, which was under Federal Control, hence the Director General received all of those payments.*" (Our italics.)

The fact that the Yard Company was never under Federal Control does not alter the situation in the least. Jurisdiction of the Yard Company may rest alone on the proposition that it was a carrier subject to the provisions of the Act to Regulate Commerce; that the Interstate Commerce Commission was invested with special jurisdiction in cases arising during the period of Federal Control; that as a necessary incident to that jurisdiction the Commission had the right to hold liable another corporation, whose charges were on file before the Interstate Commerce Commission, who assisted and cooperated with the line-haul carriers, operating under Federal control in the enforcement and collection of such intrastate charges.

Missouri Pacific R. R. Co. v. *Ault*, 256 U. S. 554, is conclusive in principle on this question. There the court on page 559 says:

> "The plain purpose of the above provision (referring to Federal Control Act) was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President. * * *"

The Federal Control Act clearly conferred on the Interstate Commerce Commission jurisdiction to award reparation on account of unreasonable and unlawful rates, charges and practices during the period of Federal Control. The Federal Control Act was a war measure in which the authority of the United States was supreme and exclusive. Therefore, in cases which arose during the period of Federal Control involving a practice to exact an unlawful charge from the shipper where all who participate in such practice or jointly and severally liable to make reparation, no distinction can be drawn between the power of the State over intrastate shipments and the power of the Interstate Commerce Commission over interstate mat-

ters. As is said by the Supreme Court of Illinois in *Davis* v. *Keystone Steel & Wire Co.*, 317 Ill. 278, at page 291:

> "It is immaterial whether the demurrage accrued on interstate or intrastate shipments, because authority to enforce intrastate rates as well as interstate rates was conferred on the President by the act of Congress of August 29, 1916, and the act of March 21, 1918,—the Federal Control Act."

Whether the Yard Company was unloading an interstate shipment or an intrastate shipment, it was acting as an agency or instrumentality of the line-haul carriers in performing that service. The rates of the line-haul carriers included compensation to themselves for such service. The unlawful charges were collected not on authority of the Yard Company tariff, but on the authority of the extra 25 cents in the line-haul carriers freight bills.

There can be, as is said by the Supreme Court of the United States in *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U. S. 426, no divided authority over interstate commerce, and the regulations of Congress on that subject are supreme. The court, on page 435, says:

> "The elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power."

Nor can there be a divided authority of the State and the Interstate Commerce Commission with reference to intrastate shipments arising during Federal Control in a case where charges on such shipments are exacted through

a practice between a corporation formally taken under Federal Control and one not so formally taken over. *The Federal Control Act was a war measure on a subject concerning which Congress had the paramount and exclusive power.* It expressly conferred jurisdiction on the Interstate Commerce Commission to grant reparation with reference to all unreasonable and unlawful rates and charges collected by the Director General during the period of Federal Control, *including interstate, foreign and intrastate traffic,* and necessarily took away from the State during the period of Federal Control jurisdiction of unreasonable and unlawful charges collected by the Director General of Railroads and growing out of purely intrastate shipments. The authority which the State had before the passage of this act to deal with unreasonable and unlawful charges growing out of purely intrastate shipments was thereby suspended during that period in every case where the Interstate Commerce Commission had jurisdiction of one of the joint participants in the unlawful practice. The unlawful charges of the line-haul carriers in this case were collected by the Yard Company and turned over to the line-haul carriers operating under Federal Control during the period of Federal Control. This brought the case within the perview of the Federal Control Act and gave the Interstate Commerce Commission complete and all-inclusive jurisdiction to grant reparation both as against the line-haul carriers operating under Federal Control and the Yards Company.

VII.

THE CONTENTION THAT COMMISSION WAS WITHOUT JURISDICTION TO AWARD REPARATION AGAINST THE YARD COMPANY IN DOCKET NO. 9977 AND THAT THEREFORE THE ORDER OF THE COMMISSION OF DECEMBER 12, 1927, IS VOID AS AGAINST THE YARD COMPANY, IS UNTENABLE AND BASED ON HYPERCRITICAL AND FAR-FETCHED CONCLUSIONS.

This point is also a new point not noticed in the opinion of the Circuit Court of Appeals or in the opinion of the District Court. As heretofore stated, the motion made by respondent Yard Company in the District Court, to direct a verdict for the Union Stock Yard & Transit Company (R. 52 to 54), specifically enumerates the various grounds upon which said motion is predicated. *The ground hereinabove mentioned in the caption of this subdivision is not mentioned.* Under the authorities cited on this point in subdivision VI of this brief, that question is not here subject to review.

In arguing this point counsel subject the language of the complaints filed with the Interstate Commerce Commission to the same or a greater degree of certainty than is required in an indictment or criminal complaint, wholly forgetting that in accordance with the decisions of the courts and of the Commission and its rules the complaint may be informal and need not be drawn in compliance with the rules relating to pleadings in the courts. Furthermore, the contentions made are unfair and place an unnatural and distorted meaning on the language of the complaints.

It is here said that the only complainant named in Docket I. C. C. No. 9977 was the Chicago Live Stock Exchange, and that that complaint must be construed to be exclusively the complaint of the Chicago Live Stock Ex-

change. Reference to the complaint filed in I. C. C. No. 9977 shows that this statement of opposing counsel is wholly unjustifiable. Paragraph 1 (R. 245) expressly states that the complaint is brought on behalf of the members of the complainant's association, severally and collectively; that said membership consists of the live stock commission merchants engaged in business at the Union Stock Yards; that said association represents every shipper and receiver of live stock at every station in the United States shipping to and from the public stock yards located at the Union Stock Yards in the City of Chicago, Illinois; that its patrons are located throughout the United States, and particularly throughout the territory in which the Chicago market is located. The prayer of the complaint (R. 256) recites that the complaint is brought in behalf of itself and its individual members and their patrons, and prays that reparation be made to the complainant's members and their patrons by way of reparation for the unlawful charges with reference to the additional 25 cents per car; and further prays that the Commission shall determine that the complainant's members and patrons are entitled to an award of damages under the provisions of the Interstate Commerce Act; and concludes with a general prayer for general relief such "as the Commission may consider proper in the premises." It is true that the petition filed in 9977 did not *at that time* specifically name the plaintiffs in this case, and did not *at that time* specifically name their patrons in whose behalf the complaint was filed, but inasmuch as the plaintiffs in this case constituted the entire membership of the Chicago Live Stock Exchange, and inasmuch as no commission merchant could transact business in the Union Stock Yards under the conditions then prevailing, it is certain that the complaint which set forth that the complaint was brought in behalf of the members necessarily meant petitioners because they were shown to

be the members of the Exchange. That fact is clearly established by the findings of the Commission (R. 149). The identity of the shippers interested is made definite and certain by the allegations of paragraph 1 of the complaint filed in I. C. C. No. 9977 (R. 245), as follows:

> "that the association represents every shipper and receiver of live stock at every station in the United States shipping to and from the public live stock market located at the Union Stock Yards in the City of Chicago, Illinois."

Furthermore, the exact identity of the shippers referred to in Section 1 of the complaint in I. C. C. No. 9977 and in the prayer of the complaint in I. C. C. No. 9977, was made definite and certain by the filing of a list of the names of the particular shippers referred to. The filing of this list of names was by authority of the Commission at a hearing before the Commission on the 20th day of May, A. D. 1919, (Defendants' Exhibit 7, R. 269). The request to file this list of the names of the shippers demanding reparation was made in the presence of counsel for the defendants who made no objection. (Record of Interstate Commerce Commission page 1926; Defendants' Exhibit 7, R. 269). Within the two-year period required by the Statute of Limitations, and on June 16, 1919, a full and complete list of the shippers in whose behalf reparation was asked in I. C. C. No. 9977, was filed with the Commission, which filing, under the established rule of procedure adopted by the Commission, was sufficient to stay the operation of the Statute of Limitations. The statement of counsel for the Yard Company, on page 90, that the list did not include appellants, who were the commission men, is not a true statement of the actual fact. The list itself, which was introduced in evidence in the District Court, refutes this statement. The items of charges covered by the instant suit are limited to charges paid during Fed-

eral Control. *The line-haul carriers paid to petitioners all items included in the award of reparation arising out of shipments prior to Federal Control.* The question raised by respondent is therefore a moot question.

It is further said by opposing counsel on page 90: "The record does show, however, that it (referring to said list) was not filed as an amendment to the complaint in Docket I. C. C. No. 9977." This is also incorrect. It is true that the defendants in the District Court called Thomas H. Gillis, the Assistant Secretary of the Interstate Commerce Commission, who testified that he had examined the record and found no *written* amendment on file in the record in Docket I. C. C. No. 9977. This witness admitted upon cross-examination that he would have no information about an amendment made upon the record in open hearing (R. 296). In accordance with the informal procedure adopted before commissions, amendments are often made verbally at the hearings and shown by the official minutes of the proceedings; such informal amendments have always been held sufficient.

"Reparation proceedings before the Commission properly may be and frequently are quite informal. Many claims on account of excessive charges are dealt with and finally disposed of without formal pleading or proof, by means of correspondence carried on by the Commission with claimants and carriers respectively." (*Lewis-Simas-Jones* v. *Southern Pacific Co.*, 283 U. S. 654.)

Counsel for the Yard Company cite *Michigan Hardwood Mfrs. Assn.* v. *Freight Bureau*, 27 I. C. C. 32, in which the Commission held that in order to stop the running of the Statute of Limitations under the two-year period it was necessary that the name of the person in whose behalf damages were sought must be stated. The rule announced was fully complied with in the instant case. *The list of*

the names of the shippers in whose behalf reparation was sought, including the names of petitioners in this case, were contained in the printed list filed with the Commission on June 16, 1919, *under authority given at the meeting of the Commission on May* 20, 1919. (Defendants' Exhibit 7, R. 269). Counsel for the Yard Company were present when permission was obtained in open session before the Commission to file the names of the shippers in whose behalf reparation was sought (Original Ex. 7). There is no showing made here that they did not have full knowledge of the contents of the list of names that was filed on June 16, 1919.

VIII.

THE CONTENTION THAT THE COMMISSION DID NOT HAVE BEFORE IT ANY COMPETENT EVIDENCE UPON WHICH IT COULD DETERMINE THE AMOUNT OF REPARATION AWARDED BY IT IS UNTENABLE AND CLEARLY REFUTED BY THE RECORD OF THE INTERSTATE COMMERCE COMMISSION ADMITTED IN EVIDENCE IN THE DISTRICT COURT.

It is most significant that the Director General of Railroads, although represented by able counsel, has not been sufficiently impressed with this contention to even mention it.

It is said by counsel for the Yard Company that the only evidence which the Commission had before it on which it could possibly have based its order of December 12, 1927, was an exhibit identified as Exhibit 1-A and offered and received in evidence on the hearing held by the Commission on October 3, 1922, (Defendants' Exhibit No. 9), and offered and received in the trial court as Defendants' Exhibit No. 37 (R. 283), and consisting of thousands of sheets showing the details with respect to the individual shipments upon which the order of reparation was based. *This state-*

ment is not in accord with the facts. In addition to Exhibit 1-A, the Commission heard the testimony of approximately a hundred witnesses on the subject. (Defendants' Orig. Ex. 8, Defendants' Orig. Ex. 9, Defendants' Orig. Ex. 10, Defendants' Orig. Ex. 11.)

THERE IS AN ABUNDANCE OF EVIDENCE TO PROVE ALL ITEMS FOR WHICH REPARATION WAS GRANTED

The record of the Interstate Commerce Commission introduced in evidence in this case shows that two copies of Exhibit 1-A were filed with the Commission on February 25, 1921, (R. 226-227), the same day the complaint in Docket No. 12614 was filed. The record further shows the foundation for the admission of Exhibit 1-A was made and the same introduced and received in evidence at the hearing of the Commission on July 14, 1921 (Defendants' Exhibit No. 8, R. 269). The statement made by counsel on page 110 of their argument that prior to the time of the hearing on July 14, 1921, the Yard Company knew nothing about it is not supported by anything in the record. The record of the proceedings before the Commission clearly shows the proper foundation and preliminary proof as to the correctness of that Exhibit 1-A, containing in great detail complete information as to each and every shipment involved in the claim for reparation involved in this case, showing the name of the consignor, the name of the consignee, the car initial and number, the date of delivery, the waybill number and date, the originating station, the rate commodity and amount of reparation claimed, was duly made by competent testimony at the hearing before the Commission. (R. 265.) It was prepared by Mr. H. R. Park, the Traffic Manager of the Chicago Live Stock Exchange, and for each member thereof, who is shown by the record of the Interstate Commerce Commission to have been an expert on the subject of rates, charges, classifications, regu-

lations, practices and tariffs, both of the line-haul carriers and of the Yard Company, and thoroughly familiar with the methods employed by the Yard Company and the line-haul carriers with reference to the handling and collection of the general transportation charges of the line-haul carriers and the loading and unloading charges of the Yard Company (R. 216).

The record further shows *without the slightest contradiction* that the information contained in Exhibit 1-A was procured by him personally and through his assistants from the original freight bills, records of the Yard Company and of the line-haul carriers, and from the records and bank-check stubs of the commission men (R. 220-229).

In addition to the testimony of Mr. Park showing the correctness of the contents contained in Exhibit 1-A, the record before the Interstate Commerce Commission shows that each and all of the petitioners in this case, or some competent person in their behalf having personal knowledge on the subject, testified as to the correctness of the items set forth in Exhibit 1-A so far as the same represented the shipments made by the shippers respectively represented by the plaintiffs in said proceeding before the Interstate Commerce Commission. (See Defendants' Exhibits Nos. 8, 9, 10, 11, referred to at pages 269, 270, 271 of the Record.)

Isolated Statements from Testimony of a Few Witnesses, Misleading.

In this connection counsel for the Yard Company on pages 99-100 of their brief set forth excerpts from the testimony of a few of the hundred or more witnesses who testified on the subject and state that the excerpts so selected are typical of the testimony of the hundred or more witnesses who testified with reference to the same matter.

An examination of these excerpts and of the record before the Interstate Commerce Commission will show that here again counsel for the Yard Company select and designate as typical certain favorable isolated statements from the testimony of two of the hundred and more witnesses testifying with reference to the same subject matter, pick flaws in their answers, and then attempt to impress the court with the idea that the testimony of all the witnesses on this subject was subject to the same criticism. The record before the Interstate Commerce Commission, however, taken as a whole, shows beyond question that the items contained in Exhibit 1-A were true and correct and that the evidence to show such fact is furnished by the testimony of at least a hundred witnesses. *Furthermore, there never at any time was the slightest effort made by counsel for the Yard Company or any of the defendants to contradict a single item contained in Exhibit 1-A.*

Objection Before Commission General, Vague and Ambiguous.

The record shows that when Exhibit 1-A was tendered in evidence at the hearing on July 14, 1921, counsel for the Yard Company made no objection whatever to its introduction. *The first and only objection which was made by counsel for the Yard Company to Exhibit 1-A as evidence is shown on page 42 of the proceedings of the Commission of October 3, 1922* (Defendants' Exhibit No. 9, R. 270). The objection was:

> "I object to the offer on behalf of Union Stock Yard & Transit Company as being incompetently and irrelevantly proved, and there has been no sufficient identification to make the offer competent as regards that document."

It will be noted that the objection is not only vague but also extremely ambiguous. At most it was very general objection not specifically stating the particular reasons

for the objection. The law is well established that objections to the introduction of testimony, especially testimony of a documentary character, must be sufficiently specific as to point out the particular objection urged so that if the objection is well taken it may be remedied by the party offering the evidence. (*Wyman* v. *City of Chicago*, 254 Ill. 202; *Grand Pass Shooting Club* v. *Crosby*, 181 Ill. 266; *B. & O. S. W. Co.* v. *Brubaker*, 217 Ill. 462.)

Furthermore, it is to be noted that the Examiner at the time Exhibit 1-A was introduced in evidence specifically stated to counsel for the Yard Company:

> "It will be received as Exhibit 1-A *and counsel for the defendants will be allowed the opportunity to go through it item by item and call for the witnesses who have purported to have received the individual shipments* for such cross-examination as is competent and relevant." (Defendants' Exhibit No. 9, R. 270, p. 42.)

No Effort Made to Question Any Item in Award of Reparation:

The record shows that never at any time did the Director General or the Yard Company produce a scintilla of evidence to contradict the correctness of a single item contained in Exhibit 1-A, although, as heretofore pointed out, the Director General of Railroads and the Yard Company had complete records of their own by which it could be demonstrated to a mathematical certainty each and every shipment of live stock involved in the claim of the petitioners before the Interstate Commerce Commission for reparation. The court will take judicial notice of the fact that railroads and industries in general necessarily keep detailed books and records of their business transactions. (*Nash* v. *Classen*, 163 Ill. 409.) Having in their possession and under their control complete and detailed information on the basis of which they might check and

verify the items set forth in Exhibit 1-A, and having failed to introduce any evidence as to any item contained in said Exhibit, it must be conclusively presumed that the items therein contained are correct, as is said by the Supreme Court of Illinois in *People* v. *Small:*

> "When a party fails or refuses to produce books and papers shown to be in his possession or under his control, his opponent may give secondary proof of their contents or establish his case by circumstantial evidence, *and if such secondary or circumstantial evidence is vague, imperfect and uncertain as to dates, sums, etc., every intendment and presumption shall be against the party who might remove all doubt by producing better evidence.*" (Italics ours.)

(*People* v. *Small,* 319 Ill. 437; *Missouri, K. & T. R. R.* v. *Elliott,* 102 Fed. 96, affirmed in 184 U. S. 695; *Armstrong* v. *Belding Bros.,* 296 Fed. 728, certiorari denied in 265 U. S. 585.)

Can anyone suppose for a moment that the Yard Company, having in its possession the original records on the basis of which any item contained in Exhibit 1-A could be attacked, did not as a matter of fact check the items contained in Exhibit 1-A with their own records? To say that they did not do so would be tantamount to saying that they were guilty of an utter indifference as to whether or not the items contained in Exhibit 1-A were or were not correct. Such an indifference cannot be imputed to the respondents, who have so strenuously, by every possible means, attempted to defeat the claims for reparation herein. To show the minuteness with which counsel for the Yard Company scrutinized Exhibit 1-A, and the proof offered to sustain it, we quote from page 101 of their argument:

> "The people who helped Mr. Park make the exhibit up are not identified beyond the statement that they were his assistants."

If counsel for the Yard Company wanted to know the names of the assistants it would have been a very easy matter to have asked concerning that matter on Mr. Park's cross-examination. But as a matter of fact what difference does it make what the names of the assistants were?

Under the modern rule experts are allowed to examine voluminous accounts, books and records and give their conclusions as to their contents. (*Reinke* v. *Sanitary District of Chicago*, 260 Ill. 380; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117; Wigmore on Evidence, Volume 3—2nd ed.—Sec. 1530.

As we have heretofore pointed out, the procedure before the Interstate Commerce Commission is necessarily much more informal and practical than the proceedings in the courts, and this court has held over and over again that the Commission is not to be controlled or hampered too narrowly by technical rules as to the admissibility of proof.

It is said by this court in *I. C. C.* v. *Baird*, 194 U. S. 25, at page 44:

> "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof."

METHOD OF PROOF SIMILAR TO METHOD APPROVED IN SPILLER CASE, EXCEPT PROOF HERE WENT MUCH FURTHER.

The facts in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, are almost identical with the facts in this case so far as the proposition of properly proving claims for

reparation before the Commission is concerned. In that case this court, on page 127, says:

> "Thousands of carload shipments were in question, but the points in real controversy were few, and there was a natural desire on all sides to expedite the hearing. In the main, counsel for the carriers cooperated in facilitating the investigation. It was not in dispute that all shipments under inquiry were made during a period when the tariff rates were under investigation, and that afterwards those rates were determined by the Commission to have been excessive. It appeared that itemized claims for reparation had been made out *in duplicate* (*one copy of each being filed*), *in the names of the parties alleged to have made shipments of cattle as owners during the period in question, that these were based in most cases upon data furnished by the commission houses at the several points of destination, as taken from their books, in other cases by the shippers themselves, and that they were computed by applying the excess charges,* as determined to the actual weights of the shipments where known, in other cases to the minimum carload weights. There was evidence that few of the cattle shippers kept books, they relying upon the commission companies to do this, *and that such companies were the consignees of the cattle, and made it a practice on receiving a shipment to pay the freight, sell the cattle, and remit the proceeds to the owner after deducting the freight paid and other charges.*" (Italics ours.)

It was objected in that case by counsel for the carriers that no sufficient foundation was laid for the introduction in evidence of the statements on which the award for reparation was made, they characterizing it as hearsay. The court, however, disposes of this objection at pages 120-130 and says:

> "The only witness sworn was Mr. Williams, assistant secretary of the Cattle Raisers' Association, *who had gathered the data upon which the claims were based, mostly from commission merchants, in some instances from the cattle shippers.* He had prepared the claims, had spent much time and pains in investigating them, and in the course of his duties had vis-

ited several of the points of destination and examined the books and records of the commission merchants to ascertain the method in which their business was conducted and records kept. It was he who testified as to the customary course of business of cattle shippers and commission merchants. He had been connected with the Cattle Raisers' Association for about eight years, and might be presumed to have some general familiarity with the business in addition to that gained in the special study he had made of it while investigating the claims. His explanation of the method of business and the details of the claims was accepted, and accepted without objection, very much as the testimony of an expert witness might have been accepted. *Whether he had shown such special knowledge as to qualify him to testify as an expert was for the Interstate Commerce Commission to determine;* and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded, which cannot be said in this case. *Stillwell Mfg. Co.* v. *Phelps*, 130 U. S. 520, 527; *Montana Ry. Co.* v. *Warren*, 137 U. S. 348, 353." (Italics ours.)

What was said by this court in the *Spiller* case with reference to the testimony of Mr. Williams, the assistant secretary of the Cattle Raisers' Association, applies equally to the testimony of Mr. H. R. Park, the Traffic Manager of the Chicago Live Stock Exchange.

IX.

THE CONTENTION THAT THE AWARD OF REPARATION HERE INVOLVED IS VOID BECAUSE THE COMMISSION IN MAKING IT CONSIDERED EVIDENCE NOT IN THE RECORD BEFORE IT IS NOT IN ACCORDANCE WITH THE FACTS.

Here again it is to be noted that the Director General, although represented by able counsel, has been so little impressed with this contention that it was not deemed fit to even mention it.

We concede, of course, that nothing can be treated as

evidence by the Commission unless it is introduced before the Commission as such. The situation presented in *United States* v. *A. & S. Ry. Co.*, 265 U. S. 274, cited by respondent, is not at all similar to the situation here present.

There is no basis in truth for the conclusion of counsel for the Yard Company that the Commission considered evidence not properly introduced before it. Counsel for the Yard Company in the trial court introduced no evidence whatever to show there was a basis of fact for this contention, *as they might easily have done if it were true.* If the Commission considered matters not introduced in evidence before it, it would have been easy for counsel for the Yard Company to have produced in the trial in the District Court some member or officer of the Commission to substantiate the point. Opposing counsel quote from the order of the Commission of May 14, 1928, (R. 211), as follows:

> "Subsequently complainants filed *with us tabulated statements* in which were embodied in convenient form summaries, *separated as to participating defendants,* of the numbers of shipments received by and amounts of reparation due to each of the parties *shown in the detailed statements previously filed.* After these summaries had been checked upon the record we issued the aforementioned order of December 12, 1927." (Italics ours.)

Now what were the "tabulated statements" and "summaries" which counsel for the Yard Company seek to make it appear were in the nature of evidence? When we read the previous order of the Commission of June 2, 1925, (R. 156), all this is made perfectly clear.

There we find the following:

> "The foregoing complainants and interveners found entitled to reparation *should severally prepare statements* in accordance with Rule V of the Rules of Practice, *separated as to participating defendant carriers,* including as a defendant the Stock Yard Com-

pany and also including the Director General of Railroads, as Agent, in appropriate cases in No. 12614. The statements should be submitted to the appropriate defendants for verification."

"TABULATED STATEMENTS" AND "SUMMARIES" WERE MERELY RULE V STATEMENTS.

The record shows that the petitioners in this case complied with the above request and direction of the Commission and prepared in accordance with Rule V of the Commission (Defendants' Exhibit 45, R. 291-292) "tabulated statements in which were embodied in convenient form summaries, separated as to the participating defendants," of the number of shipments received by and the amount of reparation due to each of the parties on the sole basis of the proof of such claims already in evidence before the Commission. The tabulated statements referred to in the report of the Commission were merely clerical compilations and allocations of items contained in Exhibit 1-A heretofore referred to. The fact of the matter is, as counsel for the Yard Company well know and as is clearly shown by reading the language of the order of May 14, 1928, in conjunction with the language of the order of June 2, 1925, *these tabulated statements and summaries were nothing more or less than the statements required by Rule V of the Rules of Practice of the Commission.* They were not evidence, nor were they intended as evidence. *They were merely tabulated statements and summaries of claims not presented as evidence but merely as statements of claim.* As well might one contend that the filing of a statement of claim in the Probate Court or in some other court was tantamount to introducing the same in evidence. As above stated, no new or additional evidence was heard by the Commission.

CONCLUSION.

While the record in this case presents strong grounds from the standpoint of the equities of the case for reversing the judgment of the District Court and the judgment of the Circuit Court of Appeals, the momentous importance and far-reaching effect of the decision of this court on such questions is of first importance. A decision by this court approving the practice resorted to by respondents to settle a controversy between themselves by passing on the burden of such controversy to the shipper, would greatly weaken the power and authority of the Commission and create a precedent fraught with danger.

We again respectfully submit that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit and the judgment of the District Court be reversed and the cause remanded to the District Court with such directions as this court may deem appropriate.

Respectfully submitted,

FRANKLIN J. STRANSKY,
CLAIR R. HILLYER,
JAMES P. CAREY, JR.,
Attorneys for Petitioners.